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We regret that in our July issue we printed the name of Frederick H. Clark as the author of the article entitled "Legality of Purchase by a Corporation of its Own Stock;" the article was really the work of Frederick H. Cooke, Esq., of the New York Bar.

NEGLIGENCE—PROXIMATE AND REMOTE CAUSE—DAMAGES—INJURY TO FEELINGS—FAILURE TO DELIVER TELEGRAPH MESSAGE.—*Western Union Telegraph Co.* v. *Ragland*, 61 South Western Rep. 421 (Court of Civil Appeals of Texas, February27, 1901).—The case involves the familiar question of negligence and the interesting consideration of the validity of a stipulation, by a telegraph company, limiting its liability for mistakes or delays in the transmission of messages to the amount of the toll paid, unless the sender order his message repeated, at an extra charge.

A message was sent which read: "To Will Rone, Commerce, Texas: Send J. J. word pa is dead and have grave dug by my

children. Leave space between for one grave. Have two wagons meet train at Campbell, at 11.50 this morning. John Ragland." When this message reached Commerce, it read: "To Will *B*one," and the mistake caused a failure of delivery. When Ragland, plaintiff, arrived with the corpse, he was not met by wagons, nor was the grave dug, wherefore he was unable to inter the remains that day, and was necessitated to hold them until the next. Plaintiff alleges that he was obliged to walk part of the way to his home, and took sick from exposure, which sickness confined him to his bed for three weeks. He sues for damages for his sickness, for the loss of time which it entailed, and for his mental distress occasioned by his having to keep the remains at his house over night, after decomposition had set in. The lower court awarded him damages, and the case arises upon appeal by the telegraph company,—wherein the lower court is reversed.

The general rule, as universally approved since *Hadley* v. *Baxendale* (9 Exch.), being that plaintiff may recover for such injuries as may fairly and reasonably be considered as arising, according to the usual course of things, from the breach, or as may reasonably be supposed to have been contemplated as the probable result thereof, the defendant complains of a charge authorizing the jury to find "for plaintiff such additional sum (beyond the cost of the message) as will compensate him for his loss of time, physical and mental pain and anguish suffered, if such as may have been the proximate and direct result of the defendant's failure to deliver such message." This complaint the court favors. Plaintiff's sickness resulting, according to his story, from exposure during a walk which he was forced to take because the object of his dispatch was not obtained, through non-delivery due to defendant's negligence, hardly bears, to such negligence, such an intimate or proximate relation of effect to cause as the law demands should exist to warrant damages. The sequence is broken, and intervening, non-essential agencies are clearly distinguishable. Loss of time resulting from failure to deliver a message, if a direct, proximate result, is generally conceded to be an appreciable injury. But the loss of time of which the plaintiff chiefly complains is even more remote than his sickness, of which it is a consequence. Neither, therefore, of these injuries is such as would be within the reasonable anticipation of the parties as likely to ensue from a breach of their contract.

Of defendant's negligence there is little doubt. Testimony was adduced to show that the company might have sent the message over a route requiring but one relay, while the route over which it actually was sent contained three relays, at each of which it had to be taken from the wires and re-transmitted. The mistake was committed at one of these relays, by an

operator's failure to correctly read the name of the addressee, though the telegraphic symbols for the confused letters were quite dissimilar. Obviously, the issue of negligence was fairly raised. The operator's act, or omission, may well be called gross negligence. The care which he failed to exercise was of a degree entirely ordinary, considered in the light of the duties of his position. The negligence of which he was guilty was sufficiently lacking in exculpatory circumstances to justify the vituperative adjective. Such negligence cannot be contracted against by the company's usual stipulation for non-liability in the instance of unrepeated messages. How far that stipulation will exonerate the telegraph companies, or be a defence in suits on mistakes or delays in unrepeated messages is a question, and fervent language has been used on either side. It seems to be agreed, however, that once negligence is clearly made out the stipulation will not unburden the companies of responsibility, for more than the amount of the toll. "To permit them to contract against their own negligence would be to arm them with a most dangerous power, and indeed that would leave the public almost entirely remediless:" *Western Union Telegraph Co.* v. *Graham,* 9 Am. Rep. 136.

"If it (the stipulation) be a contract, the sender entering into it was under a species of moral duress; his necessity compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company in their corporate greed might impose, and sign such a paper as the company might present:" *Tyler* v. *Western Union Telegraph Co.,* 60 Ill. 421. And on page 439 of the report the Supreme Court of Illinois declared the stipulation "unjust, unconscionable, without consideration, and utterly void." On the other hand, the identical stipulation has been held "reasonable and valid" by the Supreme Court of the United States, Justices Fuller and Harlan dissenting: *Primrose* v. *Western Union Telegraph Co.,* 154 W. S. 1. In that case the court quoted with approval parts of the opinion written by Judge Hare in *Passmore* v. *Western Union Telegraph Co.,* 9 Phila. 90, in which he upheld the right of the companies to so protect themselves.

"A railway, telegraph or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that, if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such as that reason, which is said to be the life of the law, can approve, or, at the least, such as it need not condemn. By no device can a body corporate avoid liability for

fraud, for willful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue." This judgment was affirmed by the Supreme Court of Pennsylvania, 78 Pa. St. 238. The stipulation has been held void as against public policy, however, in several states: *Telegraph Co.* v. *Griswold,* 37 Ohio St. 301. *Telegraph Co.* v. *Crall,* 38 Kan. 679, *Telegraph Co.* v. *Howell,* 38 Kan. 685. This side of the discussion is argued trenchantly in *Ayer* v. *Western Union Telegraph Co.,* 79 Me. 443, also 21 *Am. and Eng. Corp. Cases,* 145; and 1 *American State Rep.,* 353.

"Is such a stipulation in the contract of transmission valid, as a matter of contract assented to by the parties, or is it void as against public policy? We think it is void. Telegraph companies are quasi-public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business ultimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential for the public good that their duty of using care and diligence be rigidly enforced. They should no more be allowed effectually to stipulate for exemption from this duty than should a carrier of passengers, or any other party engaged in a public business. This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of a plain duty. It is no hardship for them. . . . Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on a special compensation for using any particular mode or instrumentality as a guard against their own negligence? It seems clear to us, that, having undertaken the business, they ought, without qualification, to do it carefully, or be responsble for want of care."

The Supreme Court of Pennsylvania, in an action on the case brought by the receiver of an erroneous message held that "though telegraph companies are not, like carriers, insurers for the safe delivery of what may be entrusted them, their obligations, as far as they reach, spring from the same sources, namely, the public nature of their employment, and the contract under which the particular duty is assumed;" and that one of the plainest of these obligations was to transmit the very message prescribed: *N. Y. and W. Printing Tel. Co.* v. *Dryburg,* 35 Pa. 298. Here it will be noted that the action is brought by the receiver of the message, to whom the condition in the blank does not apply: *Tel. Co.* v. *Richman,* 19 W. N. C. 569 (1887).

It would appear then, that the company may validly stipulate against liability, for mistakes or delays or non-delivery, for more than the toll paid, if these be not the consequences of its negligence, but that for negligence the company must answer. The rule seems fair because of the unusual nature of their business, and the peculiar possibilties of accident incident to it. The Pennsylvania law is practically the same, only for the change of position of rule and exception in its expression. "Telegraph companies are responsible in damages for mistakes in the transmission of despatches; unless the causes of failure are beyond their control:" *Brightly's Purdon's Digest,* p. 2001, and authorities there cited. From all of which the conclusion is that the company, in the principal case, would not be screened from liability by its condition imposed. The cause of failure was well within its control, and failure to bring the control to bear connates negligence. Strangely enough, the wrong is justly irremediable in damages, because of the clear severance of it from the plaintiff's injury, according to the criteria posited by law. The rupture of the continuousness of events, already noticed, defeats the plaintiff's cause of action on the ground of sickness and loss of time. Both are recognizably consequences, but remotely. The defendant's undoubted wrong bears to the plaintiff's alleged injury, at most the relation of a *conditio sine qua non.* Efficient causality is wanting.

The other ground for plaintiff's suit, his mental suffering, is disposed of according to the rule which has come to be followed in Texas, after some difference of opinion. In 1881 the Supreme Court of that state held that the sendee of a message might recover from the company for mental suffering caused by its failure to promptly deliver a message which announced to him the death of his mother. The general proposition has been repeatedly re-affirmed in that state, so that mental distress has been recognized as redressable in damages. The case in 1881 was *So. Relle* v. *The Telegraph Company,* 55 Texas, 308. This is, however, the only Texas case which holds that a party may come into court solely to redress his feelings,—and in so far as the case held that such damage alone would sustain an action, it was overruled in *R. R. Co.* v. *Levy,* 59 Texas, 542.

In the Ragland case the decision was plain that, the other causes for recovery being eliminated, the "mental anguish" ground was invalid standing alone. Mental suffering, however, has been allowed to form an element of actual damage: *Stuart* v. *W. W. Tel. Co.,* 66 Texas, 580. But such mental suffering as may be occasioned by failure to transmit or deliver cannot be emphasized into a ground for the recovery of punitory damages: *McAllen* v. *W. W. Tel. Co.,* 70 Texas, 243. Mental suffering, as incident to some actual, or physical injury, is considered a measurable damage in many Texas cases, influenced by the So.

Relle case. In addition to those cited, see *Tel. Co.* v. *Cooper,* 71 Texas, 567; *Loper* v. *Tel. Co.,* 70 Texas, 689; *Tel. Co.* v. *Simpson,* 73 Texas, 422; *Tel. Co.* v. *Adams,* 75 Texas, 531, and the following case, *Ibid.* 537, *Tel. Co.* v. *Moore,* 76 Texas, 57. The courts of Alabama, Tennessee, Indiana and Kentucky have relied on these Texas decisions as authority, and followed them. And their rule of damages is enforced by the Supreme Courts of Georgia and Virginia, even where the message is in cipher. The language of *W. W. Tel.* v. *Adams,* 75 Texas, 531 (1889), is somewhat cautious, asserting that the production of evidence of mental suffering should not be denied, but that the evidence should not have a "controlling effect." The Tennessee case of *Wadsworth* v. *Tel. Co.,* 86 Tenn. 695 (1888), following the Texas cases prior to its date, awarded damages for mental suffering, the court saying: "Its (the company's) single and plain duty is to make the transmission and delivery with promptitude and accuracy. When that is done, its responsibility is ended. When it is omitted, through negligence, the company must answer for all injury resulting, whether to the feelings or to the purse, one or both, subject alone to the proviso that the injury be the natural and direct consequence of the negligent act." All these decisions, however, seem to rest upon the authority of each other, finding no support in the decisions of other states, nor in those of England. "Mental pain and anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone:" *Lynch* v. *Knight,* 9 H. L. Cas. 577. And examples of similar denials are legion: *Donah* v. *R. R.,* 65 Miss, 14; *West* v. *Tel Co.,* 39 Kan. 93; *Russell* v. *Tel. Co.,* 3 Dak. 315; *Wyman* v. *Leavitt,* 71 Me. 227; *R. R. Co.* v. *Stables,* 62 Ill. 313. In *Tel Co.* v. *Rogers,* 68 Miss. 748 (1891), plaintiff sustained no pecuniary loss, but seeks to recover for the disappointment of not being informed of the death of his brother in time to attend his burial Recovery was denied him, the court saying: "We have given to the investigation of the question that consideration which its importance demands, and, though the right of the plaintiff to recover the damages awarded in this case finds support in the decisions of several of the states, we are unwilling to depart from the long-established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of the willful wrong of the defendant." In *Rowell* v. *Tel. Co.,* 75 Texas, 26, the damage complained of was continued anxiety caused by failure to promptly deliver a message, and the court said: "Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases, but the cases are rare in which such emotion can be held an element of the damages resulting from the breach. For injury

to the feelings in such cases the court cannot give redress. Any other rule would result in intolerable litigation."

The late case of *Tel. Co.* v. *Edmonson,* 91 Texas, 209, 42 S. W. Rep. 544, refused utterly to follow the earlier Texas decisions, holding that mental anguish, suspense and anxiety, were not sufficiently natural results of the company's breach of contract to warrant damages, and pronouncing the wrong *damnum absque injuria.* In other states the courts are still more strict in giving damages for injuries incapable of accurate, or at least approximate measurement in money. Loss of credit is a more tangible injury than mental distress, and would appear quite susceptible of being measured in pecuniary terms. Yet it was held in Pennsylvania that for loss of credit, unaccompanied by pecuniary loss, a company was not liable: *Smith* v. *Tel. Co.,* 150 Pa. 561 (1893).

The same theory would probably be followed to-day in the jurisdictions mentioned as maintaining the opposite view a few years since. Texas itself leans that way in more recent decisions: *Tel. Co.* v. *Carter,* 85 Texas, 580; *Tel Co.* v. *Slites,* 89 Texas, 312. And it is believed to have been properly applied in the Ragland case. The plaintiff undoubtedly makes out a wrong in defendant, and could he show any injury resulting to himself as a natural and probable sequence, or such as both parties might have contemplated as likely to result from a breach, when their contract was formed, damages should be awarded him. Unfortunately, the only damage he can show is too remote to be considered by the law, or too intangible to be grasped by practical justice, such an injury, in a word, as cannot be recompensed in damages without countenancing a rule whose consistent application is impracticable.

J. W. H.

CARRIERS — STOPPAGE IN TRANSITU — END OF TRANSIT — STORAGE OF GOODS—CARRIER AS BAILEE.—*Brewer Lumber Co.* v. *Boston and A. R. Co.,* 60 Northeastern, 548, (*Supreme* Judicial Court of Massachusetts, June 1, 1901).—The action in this case was one of replevin for a carload of lumber, which had been shipped over the defendant's railroad, the agreement between consignor and consignee being that the consignee pay the freight. Upon its arrival the consignee was notified of the fact, but failed to remove it within the time required by the rules of the company. The lumber was then stored in the sheds of the railroad company wher it remained for two months, being held for freight and storage charges. At the end of this time, the consignee having become bankrupt, the consignor notified

the railroad company not to deliver the lumber, claiming to exercise the right of stoppage *in transitu*. The trustee of the bankrupt defended the action.

The court held that the *transitu* had not ended since the consignee had never had actual or constructive possession of the lumber, and that therefore the right of stoppage *in transitu* remained.

There was formerly some doubt as to whether a constructive possession by the consignee was sufficient to divest this right. The case of *Newhall* v. *Vargas,* 15 Me. 314, is authority for the following statement: "Stoppage *in transitu* is a resumption by the seller of the possession of goods not paid for, while on their way to the vendee and before he has acquired *actual* possession of them." This definition represents the view taken by some of the old cases. At the present time, however, the law seems well settled that a constructive possession by the consignee is sufficient to preclude the right. The court, therefore, was correct in saying, "It makes no difference whether the goods are in the hands of the carrier *qua* carrier or whether he puts them, at the journey's end, in a warehouse. In other words, the transit does not terminate until the goods arrive in the possession, actual or constructive, of the purchaser:" *Seymour* v. *Newton,* 105 Mass. 272; *Mohr* v. *Railroad Co.,* 106 Mass. 67; *Umber Co.* v. *O'Brien,* 123 Mass. 12; *Inslie* v. *Lane,* 57 N. H. 454.

In the present case there was no actual possession by the consignee. Was there then a constructive possession? To determine this it is necessary to find out the meaning of the term "constructive possession." This appears to refer to the possession of an agent of the consignee; and there is no doubt that upon the arrval of the goods the consignee may by contract constitute the carrier, his agent, to receive and store them for him. This thought is expressed by Parke, B., in *Whitehead* v. *Anderson,* 9 M. & W. 534, where he says, "A case of constructive possession is where the carrier enters expressly or by implication into a new agreement distinct from the original contract for carriage to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new and further order to be given by him."

In cases where the freight remains unpaid upon the arrival of the goods, the subsequent storing of them by the carrier raises no presumption that he is doing so as agent of the consignee. On the contrary the law is well settled that the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier. This is because the consignee is not entitled to the goods until he discharges the lien of the carrier. However,

this presumption may be rebutted by proof of an agreement between consignee and carrier whereby the carrier agrees to hold the goods as agent of the consignee, while at the same time retaining his lien for freight charges by means of his possession: *Ex parte Barrow,* 6 Ch. Div. 783; *Ex parte Cooper,* 11 Ch. Div. 68; *Ex parte Falk,* 14 Ch. Div. 446. In other words, it is not necessary that the carrrier's lien should first be discharged before it can agree to hold the goods as agent of the consignee. Mr. Benjamin, in his book on "Sales," expresses this thought in the following words: "The carrier's change of character into that of an agent to keep the goods for the buyer is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or freight charges is satisfied. Nothing prevents an agreement by the master of a vessel or other carrier to hold the goods, after arrival at destination, as agent of the buyer, though he may at the same time say, 'I shall not let you take them until my freight is paid' ": "Benjamin on Sales," 4 Am. Ed., §853; *Hall* v. *Dimond,* 63 N. H. 569; *Allen* v. *Gupper,* 2 C. & J. 218.

This being the law, although in the present case, the consignee had never paid the freight charges, and the carrier therefore held the goods primarily by virtue of his lien, yet if an agreement could be shown whereby the carrier had agreed to hold the goods as agent of the consignee, the *transitu* would have ended, and the consignor been precluded from exercising the right of stoppage. Such an agreement was attempted to be shown by the trustee of the bankrupt. It appeared in evidence that upon the arrival of the lumber notice of the same was given the consignee by the railroad company. In addition, the postal card contained the following: "If not unloaded within ninety-six hours . . . the freight will be subject to storage charges, as per rules of the Massachusetts and New Hampshire Car Service Association." The consignee testified that within a few days after receiving this postal card, he telephoned the railroad company to store the lumber, but upon cross-examination was unable to say what answer he had received. This testimony was contradicted by the freight agent of the defendant company, who testified "that he remembered the car of lumber, and stored it in the ordinary course of business; and that he received no directions from any one to store it."

As the case was tried without a jury, the finding of fact upon this point devolved upon the judge below, and such finding could not be reviewed by the court above. If then the court found that no order to store was given the railroad company by the consignee, no error was committed in refusing to rule, as requested by the defendant, "that the plaintiff had lost the right of stoppage *in transitu,* or had not seasonably exercised that right."

The ruling of the court below on this point was as follows: "The storage of the lumber in question by the defendant, whether according to the custom of storing after the expiration of the limit of time set forth in the notice given by the defendant to the consignee, or in accordance with the notice to store given by the consignee, does not terminate the transit, without evidence of the attornment by the defendant to the consignee, or an agreement to hold as agent of the consignee."

This ruling of view of authority, appears to be correct. Even supposing the railroad company had received the consignee's message to store the lumber, no agency could be proved without showing an agreement on the part of the carrier to such. This is because the consignee cannot make the carrier his agent without the carrier's consent. The postal card sent the consignee by the railroad company cannot be construed as an offer to store the lumber as his agent, which offer was accepted by his telephonic message. It was merely a statement by the carrier of its legal rights, and not an offer to enter into a new relation. This becomes clearer when we consider that in Massachusetts the carrier's lien does include charges for storage: *Miller* v. *Mansfield,* 112 Mass. 260; *Barker* v. *Brown,* 138 Mass. 340.

Hence, there was no agreement on the part of the railroad company to store the lumber as agent of the consignee; such obligation could not be thrust upon it without its consent; and in the absence of proof of such agreement the presumption that the carrier continued to hold the goods by virtue of its lien remained unrebutted.

D. H. Y.